The interpretation of the common ownership grandfather protection by the Massachusetts Appeals Court opens doors which would otherwise not be available to landowners. Since the freeze period does not commence until the effective date of the zoning amendment, having a plan recorded or endorsed guarantees a landowner a future five-year zoning exemption from increased dimensional requirements to single or two-family use.

The interpretation by the Massachusetts Appeals Court has increased the protection afforded "Approval Not Required Plans." In addition to land being protected from use changes to the zoning bylaw or ordinance, the lots shown on such plans will also be protected from increased dimensional requirements to single and two-family use if they meet the conditions for common ownership protection.

The common ownership zoning freeze protects no more than three adjoining lots from increases in area, frontage, width, yard, or depth requirements to a lot for single or two-family use. In order for a lot to qualify for the grandfather protection, it must meet the following conditions:

1. The lot must be shown on a plan which is either recorded or endorsed before the effective date of the increased zoning requirements.

2. The lot must have at least 7,500 square feet of area and at least 75 feet of frontage.

3. The lot must comply with applicable zoning requirements when recorded or endorsed and conform to the zoning requirements in effect as of January 1, 1976.

4. The lot must have been held in common ownership with any adjoining land before the effective date of the increased zoning requirements.

ANR AND COMMON DRIVEWAYS

Case law has established the principle that each lot shown on an ANR plan must be able to access onto the way from the designated frontage. For example, in McCarthy v. Planning Board of Edgartown, 381 Mass. 86 (1980), the Massachusetts Supreme Court upheld the denial of an ANR plan because the landowner could not access his proposed lots to the public road shown on the plan. The Martha's Vineyard Commission had adopted a regulation which was in force in the town of Edgartown. The regulation required that any additional vehicular access (driveways) to a public road had to be at least 1,000 feet apart. McCarthy had submitted an ANR plan to the Planning Board. The Edgartown Zoning Bylaw required a minimum lot frontage of 100 feet. Each lot shown on McCarthy's plan had the required frontage on a public road. However, the Planning Board denied the requested ANR endorsement. The Planning Board contended that the Martha's Vineyard Commission's vehicular access regulation deprived the lots practical access as driveways could not be constructed to the public way. Therefore, the proposed lots did not have the type of frontage required by the Subdivision Control Law for the purposes of an ANR endorsement. The Massachusetts Supreme Court agreed with the Planning Board. See also Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979), where the Massachusetts Appeals Court held that lots abutting a limited access highway did not have the required frontage on a way for the purpose of an ANR endorsement.

All lots shown on an ANR plan must be able to provide vehicular access to a way from the designated frontage. However, what happens when a landowner proposes to construct a common driveway rather than individual driveways to a way?

1. Is a proposed common driveway a relevant factor in determining whether a plan is entitled to an ANR endorsement?

2. In reviewing an ANR plan, does the Planning Board have the authority to make a determination that a proposed common driveway provides the necessary vital access to each lot?

The Massachusetts Appeals Court took a look at both questions in Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987). Robert Fox owned a parcel of land which abutted the Neponset Valley Parkway. Fox submitted a plan to the Planning Board for an ANR endorsement. The plan showed the division of his parcel into four lots. Each lot abutted parkway land for a distance of 150 feet which was the minimum frontage requirement of the Milton Zoning Bylaw. The proposed lots were separated from the paved portion of the parkway by a greenbelt which was approximately 175 feet wide. However, Fox had obtained an access

permit from the Metropolitan District Commission for a "T" shaped common driveway connecting, at the base, to the paved road and, at the top, to the four lots where they abutted the greenbelt. The proposed common driveway was shown on the ANR plan. The Planning Board denied endorsement ruling that the plan showed a subdivision. Fox appealed.

The Planning Board, in denying its endorsement, relied on a line of previous court cases which have held that the frontage on a public way required by the Subdivision Control Law must be frontage that offers serviceable access from the buildable portion of the lot to the public way on which the lot fronts. In the Board's view, Fox's parcel was effectively blocked from the paved roadway by the greenbelt so that his proposal was essentially for the development of back land. Therefore, the Planning Board contended that the proposed common access driveway should be subject to their regulations governing the construction of roads in subdivisions.

The two issues before the court were:

1. whether the parcel in question had a right of access over the greenbelt to the parkway; and

2. whether the proposed common driveway would prevent Fox from obtaining an ANR endorsement from the Planning Board.

As to the question of access, the court found that Fox had rights of access to the Neponset Valley Parkway. Chapter 288 of the Acts of 1894 authorized the Metropolitan Park Commissioners to take land for the construction of parkways and boulevards. Pursuant to this authority, the Metropolitan Park Commissioners took land in 1904 to construct the Neponset Valley Parkway. In Anzalone v. Metropolitan District Commission, 257 Mass. 32 (1926), the court ruled that in contrast to roadways constructed within public parks, roadways constructed under the 1894 statute were public ways to which abutting owners had a common-law right of access. Anzalone also noted that if land, adjacent to roadways which were constructed under the authority of the 1894 statute, was divided into separate ownership lots, then each lot owner would have a right of access from his lot to the roadway. The court concluded that Fox's right of access to the parkway was not impaired or limited by the substantial intervening greenbelt. Since each of the proposed lots shown on the plan had a guaranteed right of access to the parkway, Fox argued that the construction of a common driveway rather than four individual driveways should be of no concern to the Planning Board when reviewing an ANR plan. The court agreed.

FOX V. PLANNING BOARD OF MILTON

24 Mass. App. Ct. 572 (1987)

Excerpts:

Armstrong, J. . . .

> The proposed common driveway is not relevant to determining whether Fox's plan shows a subdivision. If all the lots have the requisite frontage on a public way, and the availability of access implied by that frontage is not shown to be illusory in fact, it is of no concern to a planning board that the developer may propose a common driveway, rather than individual driveways, perhaps for aesthetic reasons or reasons of cost. The Subdivision Control Law is concerned with access to the lot, not to the house; there is nothing in it that prevents owners from choosing, if they are so inclined, to build their houses far from the road, with no provision for vehicular access, so long as their lots have the frontage that makes such access possible. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. at 272-273. Here, each of the proposed lots has the frontage called for by the Milton by-law. Under the Anzalone case each has a guaranteed right of access to the road itself. These facts satisfy the requirements of Section 81L.

The Fox decision provides valuable insight concerning common driveways and vital access. Ask the following questions when reviewing ANR plans and proposed common driveways.

1. Do all the proposed building lots have the frontage on an acceptable way as defined in Chapter 41, Section 81L, MGL?

2. Is access to any of the lots from such frontage illusory in nature? The lot frontage must provide practical access to the way or public way. A lot condition which would prevent practical access over the front lot line such as a steep slope is an appropriate matter for a Planning Board to consider before endorsing an ANR plan. See DiCarlo v. Planning Board of Wayland, 19 Mass. App. Ct. 911 (1984); Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989); Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992).

3. Does the proposed common driveway access over the frontage shown on the ANR plan to the acceptable way or public way? Access obtained by way of easement over a side or rear lot line is not authorized unless approved by the Planning Board. See DiCarlo v. Planning Board of Wayland, supra.

An issue that the Fox decision did not address was the question of zoning. Just because a proposed division of land may be entitled to an ANR endorsement for the purposes of the Subdivision Control Law does not mean that the lots or a proposed common driveway are buildable under the provisions of the local zoning bylaw. An ANR endorsement gives the lots no standing under the zoning bylaw. See Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980).

Access roadways are a use of land which must conform to the provisions of the local zoning bylaw. This issue first came to light when, in 1954, the town of Braintree amended its zoning map by changing a large parcel of land from a residential district to an industrial district. The rezoning resulted in creating an industrial district which was entirely surrounded by residential zoning districts. Textron Industries purchased a tract of land in which the major portion was located in the industrial district and constructed a factory. Textron also constructed roadways for access to the factory built in the industrial zone. However, the access roadways passed through residential zoning districts. Tredwell Harrison, an abutter, sought enforcement action as to the construction of the access roadways and requested their relocation. Textron argued that the access over the residential land was necessarily implicit in a zoning scheme which completely surrounds industrial areas with residentially zoned land and pointed out that without access across the residentially zoned land, the industrially zoned land could not be used for the purposes intended in an industrial district. In Harrison v. Building Inspector of Braintree, 350 Mass. 559 (1966), the court found that since the residential zone did not expressly authorize industrial use, then the use of land in the residential zone as an access roadway for an industrial use violated the requirements of a residential zone. The court did not rule on Textron's claim that the 1954 amendment was an unreasonable classification of the industrial land without the necessary access as there was no statutory basis for modifying the requirements of the residential zone to make reasonable the classification in the industrial zone. The court noted that if the 1954 amendment was invalid because of unreasonable classification it would appear that the residential land, as well as the industrial land, would remain residential. In deciding against Textron, the court delayed any order for compliance with the zoning bylaw to allow the town of Braintree an opportunity to determine whether to provide legal access to the land in the industrial zone.

The issue of the Textron access roadways would be considered in two more court cases. Eventually, however, the problem would be solved when the town accepted the access ways as town ways. See Harrison v. Braintree, 355 Mass. 651 (1969); Harrison v. Textron, Inc., 367 Mass. 540 (1975).

Since the first Harrison decision, there have been other cases which have looked at the issue of access roadways and their relationship to local zoning. Richardson v. Zoning Board of Appeals of Framingham, 351 Mass. 375 (1966), dealt with an access way for a forty-four unit apartment house. The access roadway was located on land zoned for single family. An apartment house was not listed as a permitted use in a single family zone. The Zoning Board of Appeals had determined that the implied intent of the zoning bylaw was to allow access roadways in single family zones. The court overturned the Board's decision reasoning that access roadways should be expressly dealt with in the zoning bylaw. The court also noted that other access was available to the apartment building.

In Building Inspector of Dennis v. Harvey, 2 Mass. App. Ct. 584 (1974), the court found that the use of land lying within a residential zone as an access roadway for commercial use located in an unrestricted zone was not authorized by the zoning bylaw. As was the case in Richardson, other access was available to the property.

Sometimes a tract of land will be divided by a municipal boundary so that the land will be subject to different zoning regulations. Town of Chelmsford v. Byrne, 6 Mass. App. Ct. 848 (1978) involved access to property located in the city of Lowell and zoned for industry by means of an access road which was located in a residential zone in the town of Chelmsford. The court held that the principle established in the first Harrison case that an owner of land in an industrial district may not use land in an adjacent residential zone as access roadways for its industrial use is also controlling when districts zoned for different uses lie in different municipalities. However, the access roadway was the only means of access to the industrial land. The court remanded the case to the Superior Court for a determination whether the effect of the Chelmsford bylaw was to bar any access to the land located in Lowell for a lawful use.

In Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967), the court faced the situation where a tract of land consisting of a strip from 14-23 feet wide was located in an area of the city of Brockton which was zoned residential, and the remainder of the parcel was located in the town of Abington and zoned for business. The only access to the business portion of the land was through the residentially zoned strip located in Brockton. Lapenas sought a variance under the Brockton ordinance for access to a gasoline station for which the Building Inspector in Abington had issued a building permit. The variance was denied by the zoning Board of Appeals. The court held that the Zoning Board of Appeals' interpretation of the Brockton ordinance was in error and could not be construed as prohibiting access to the land located in Abington. Even though a variance was not considered necessary, the court found that since the land in the residential zone was too narrow to be useable for any permitted purpose, and the commercially zoned land in Abington was without access, Lapenas was entitled to relief from the literal operation of the Brockton zoning ordinance.

If a local zoning bylaw remains silent relative to the use of land for a common driveway, then the zoning enforcement officer will have to determine whether a proposed common driveway

would be an allowable accessory use. In order to make this interpretation we believe, as a minimum, each lot would have to access over its own frontage. In its report to the General Court relative to restricting the zoning power to city and town governments, (see 1968 Senate No. 1133, at 107) the Legislative Research Council noted that one of the primary purposes of zoning frontage requirements for residential lots is to "assure adequate access of these lots to the street which faces them ... ."

The Land Court has not looked favorably towards the use of land for a common driveway where the zoning bylaw has not expressly authorized common driveways. In Litchfield Company, Inc. v. Board of Appeals of the City of Woburn, Misc. Case No. 199971 (August 5, 1997), the court held that if the intent of the City's zoning ordinance was to permit residential driveways to access streets from lot lines other than the front lot line, the ordinance should have been so written. In the absence of a zoning provision authorizing a common driveway, the prohibition stated in the zoning ordinance that "no use of land not specified in this zoning ordinance shall be permitted" must be enforced. In RHB Development, Inc. v. Duxbury Zoning Board of Appeals, Misc. Case No. 237281 (September 19, 1997), the court concluded that "it strains credulity past the breaking point to suggest that common driveways are permitted as an accessory use to a residential use, as a matter of right and without limitations, where (i) such a common driveway is not expressly authorized anywhere in the by-law, (ii) accessory uses to a residential use are required to be 'on the same lot,' (iii) common driveways for 'cluster' developments require a special permit and are limited to serving no more than two dwellings, and (iv) driveways serving as part of mandated parking facilities are required to be on the same lot."

To assist the zoning enforcement officer in interpreting your local zoning ordinance or bylaw we would suggest that communities adopt zoning provisions either authorizing or prohibiting common driveways. If you choose to permit common driveways, consider the following regulations.

1. Authorize common driveways through the issuance of a special permit.

2. Limit the number of lots that may be accessed by a common driveway.

3. Specify that common driveways may never be used to satisfy zoning frontage requirements.

4. Establish construction standards for common driveways.

5. Require that common driveways access over approved frontage.

6. Designate a maximum length for common driveways.

81L EXEMPTION

Whether a plan is entitled to be endorsed as "approval under the Subdivision Control Law not required" is determined by the definition of "subdivision" found in Chapter 41, Section 81L, MGL. Included in this definition is the following exemption:

> . . . the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

The original versions of the Subdivision Control Law, as appearing in St. 1936, c. 211, and St. 1947, c. 340, did not contain this exemption. It was added in a 1953 general revision of the law by St. 1953, c. 674, s.7. The purpose of the exemption is not clear but the Report of the Special Commission on Planning and Zoning, 1953 House Doc. No. 2249, at 54, shows that the drafters were aware of what they were doing, although it does not explain their reasons.

The main issue dealing with the 81L exemption has been the interpretation of the term "buildings." The legislation is unclear as to what types of structures had to be in existence prior to the Subdivision Control Law taking effect in a community in order to qualify for the exemption. There were no reported cases dealing with this exclusion until Citgo Petroleum Corporation v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987).

Citgo owned a parcel of some 68 acres of land which contained a number of buildings. Clean Harbors leased eleven acres of the parcel for a hazardous waste terminal and reached an agreement with Citgo to buy the eleven acres. Citgo prepared a plan dividing the parcel into two lots each containing several buildings. Citgo's contention was that the buildings existed before the Subdivision Control Law went into effect in Braintree and thus the plan was not a subdivision because of the 81L exemption. The Planning Board denied ANR endorsement because the lot to be conveyed to Clean Harbors lacked the necessary frontage. The Board took the position that a literal reading of the term "building" would undercut the purposes the Subdivision Control Law by allowing a landowner to use any detached garage, shed or other outbuilding as a basis for unrestricted backland development.

CITGO PETROLEUM CORP. V. PLANNING BOARD OF BRAINTREE

24 Mass. App. Ct. 425 (1987)

Excerpts:

Armstrong, J. . . .

> The defendants argue that a literal reading of this exception would completely undercut the purposes of the Subdivision Control Law, as set out in G.L. c. 41, section 81M, by allowing a homeowner to use any detached garage, shed, or other outbuilding as a basis for unrestricted backland development. There are several replies. First, this language in section 81L is not the result of legislative oversight. . . . Second, just because a lot can be divided under this exception does not mean that the resulting lots will be buildable under the zoning ordinance. Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599, 603 (1980). Third, the lots in this case are being used for distinct, independent business operations, and the preexisting buildings relied upon the main office, the underwriter's pump house/machine shop, the wax plant building, the earth burner building, and the new yard office - are substantial buildings. A claim that a detached garage or a chicken house or woodshed qualifies under this exception might present a different case. Finally, a building, to qualify under this provision, must have been in existence when the Subdivision Control Law went into effect in the town. It is too late for speculators to buy tracts of back land, cover them with shacks, and divide them into lots accordingly. In short, we see no sufficient reason to refuse application of the plain language of the exclusion in this case.

What constitutes a "substantial building" is still unclear. However, a landowner may have a problem arguing that a garage, woodshed or chicken house are buildings that would qualify under the 81L exemption. Since the Citgo decision, there has been one Land Court case which has taken a look at the "substantial building" issue. In Taylor v. Pembroke Planning Board, (Plymouth) Misc. Case No. 126703, 1990 (Fenton J.), the court determined that in order to qualify for the 81L exemption, the use of a building is no way controlling on the issue. An 88.6 foot by 30.8 foot cement block building with its own cesspool and electricity that had been used to store automobiles and as a turkey farm was found to be a substantial building.

The most interesting aspect of the Citgo case is the notation by the court that the 81L exemption does not relieve a property owner from complying with local zoning requirements. This exemption is only for the purposes of the Subdivision Control Law. In reviewing the Citgo case,

Judge Kilborn of the Land Court noted in Mignosa v. Parks, 6 LCR 279 (1998) (Misc. Case No. 215750), that the division of land under the 81L exemption creates a zoning violation.

"The 81L exception applies in a subdivision context and is unrelated to zoning. Lots created by the exception must stand or fall on their own for zoning purposes. This is recognized by the Appeals Court:

> '... just because a lot can be divided under this exception does not mean that the resulting lots will be buildable under the zoning ordinance. *Smalley v. Planning Board of Harwich*, 10 Mass. App. Ct. 599, 603 (1980).' *Citgo*, at 427."

PERIMETER PLANS

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn indicating a division of land. Such plans are usually filed so that the property owner can obtain a three year zoning protection for the land shown on such plan. There has been case law that has looked at the question as to whether a perimeter plan is entitled to an ANR endorsement from the Planning Board.

The Subdivision Control Law is a comprehensive scheme for regulating the creation of new lots and for the recording of plans showing such new lots. There are three sections of the Subdivision Control Law which are relevant to the perimeter plan issue.

1. Section 81L which defines the term "subdivision" as well as divisions of land that will not be considered a subdivision.

2. Section 81P which sets out the procedure for endorsement of plans not requiring subdivision approval.

3. Section 81X which provides a procedure for recording plans which show no new lot lines.

The first paragraph of Section 81X states:

> Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownerships or for new ways are shown.

Should a perimeter plan be recorded only with a certificate of a registered land surveyor under Section 81X or is a perimeter plan entitled to an ANR endorsement from the Planning Board pursuant to Section 81L and 81P?

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.), a landowner obtained an ANR endorsement to protect his property from a zoning change. The Planning Board had endorsed the plan which depicted one

lot with the exact dimensions and bounds shown on an earlier plan registered with the land court. In finding that the Planning Board had mistakenly endorsed the plan, the court noted:

> As a matter of law, the plaintiffs cannot file their April, 1985, plan in the Land Court. The plan is not a subdivision nor is it a division of land with "approval not required". Lot No. 91 was created in 1960 and registered as noted. As far as the Land Court would be concerned, its status has not changed since 1960. As a matter of law, the Planning Board should not have endorsed the April, 1985, plan. Nevertheless, the action of the Planning Board was not appealed and the legality of its action is not before this Court for review. Once a plan has been endorsed 'approval not required', the Court cannot go behind that endorsement unless the action of the board is before the Court for review. As a matter of law, the plaintiffs are entitled to the three-year protection despite the method by which same was derived. In an exercise of judicial constraint, I make no comment on the methods utilized and with judicial reluctance enter this judgment.

In Horne, the landowner succeeded in protecting his property from the zoning change because the Court could not revoke the Planning Board's endorsement since the issue was not properly before the Court. However, in Malden Trust Company v. Twomey, Middlesex Superior Court C.A No. 6574, September 28, 1989 (McDaniel J.), the Planning Commission declined to endorse a plan "ANR" which showed no new property lines. In upholding the Commission's decision not to endorse the plan, the court noted:

> . . ., it should be clear that the purpose of section 81P is to relieve certain divisions of land of regulation and approval by a planning board when a proposed plan indicates that newly created lots will be guaranteed access to the outside world by preexisting ways or roads. In sum, section 81P facilitates the recording process, and was "not intended to enlarge the substantive powers of a [planning] board." Thus, when section 81P states that "an endorsement shall not be withheld unless such plan shows a subdivision," it is clear from the above discussion that the Legislature intended to expedite the recording of 'non-subdivision' plans, and not to encourage the filing under section 81P of plans showing no subdivision of lots whatsoever. . . . .
>
> Plaintiff's plan shows no division of land and hence there is no need for the verification process of section 81P. Moreover, plaintiff's plan may have easily been filed under section 81X. It is clear that plaintiff instead sought section 81P endorsement to achieve the advantage of the zoning protection provided under G.L. c. 40A, section 6 to those plans endorsed ANR under section 81P. Withholding comment on this tactic, the Court simply states that plaintiff's perimeter plan is properly filed under section 81X, not section 81P.

> Consequently, the defendant was never under an obligation to endorse plaintiff's plan under section 81P.

However, in Costello v. Planning Board of Westport, (Bristol) Misc. Case No. 152765, 1991 (Sullivan, J.), a Land Court Judge decided that perimeter plans are entitled to an ANR endorsement. In her opinion, Judge Sullivan determined that Section 81P of the Subdivision Control Law, provides for such an endorsement. Judge Sullivan summarized that:

> Nothing in the statute requires the conclusion that only divisions of land which are deemed by virtue of the provisions of G.L. c. 41, § 81L not to constitute a subdivision were entitled to such an endorsement. The plain language says otherwise, and as it presently reads, a perimeter plan must be endorsed by the Board.

It should be noted that neither the Costello, Twomey, or Horne cases are controlling on the issue as a higher court is not required to follow an opinion written by a lower court. The perimeter plan issue still remains unsolved.

The Massachusetts Appeals Court, in Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), although not specifically addressing the perimeter plan issue, noted the need to show a division of land when submitting an ANR plan. In Perry, the landowner submitted a perimeter plan showing a triangular shaped lot abutted on all three sides by existing ways. The main issue in the case dealt with the adequacy of the ways, but it was also argued whether there was a need to show a division of land in order to be entitled to an ANR endorsement.

Perry argued that his plan was entitled to an ANR endorsement based upon the rationale found in Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963). The Bloom decision involved the division of a tract of land into two parcels. One parcel did not meet the minimum frontage requirement of the zoning bylaw for a building lot. However, the landowner placed a notation on the plan that the parcel didn't conform to the zoning bylaw.

The Supreme Judicial Court held that since the plan showed that the lot with inadequate frontage would be unusable for building, it was not a plan subject to subdivision control. The court observed that by the definition in the Subdivision Control Law, a "lot" is "an area of land... used, or available for use, as the site of one or more buildings," and a "subdivision" is "the division of a tract of land into two or more lots . . . ." The court reasoned that a division of land

into two parcels, one of which clearly could not be used for building under the zoning law, was therefore not a division into two "lots" and, therefore, not a subdivision.

PERRY V. PLANNING BOARD OF NANTUCKET

15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> In Bloom, the petitioner's plan disclosed the residual lot's inadequacy for building purposes. It was thus clear that the parcel with inadequate frontage was not a section 81L "lot." In the present case, the plan of lot 750 contains no information at all concerning the dimensions or boundaries of the tract from which lot 750 is proposed to be severed. The remaining land may or may not be "available for use. . . as the site of one or more buildings." Unlike the situation in Bloom, Perry's plan is not one "which disavows any claim of existing right to use [the remaining land] as a zoning by-law lot."
>
> . . . Although an 81P endorsement carries no implication that the subject lots comply with zoning ordinances in all respects, it is expected to address "the fact of adequate frontage of the newly created lots." Where the plan shows on its face that the endorsement was occasioned by the fact that inadequate frontage brought a parcel outside the definition of a section 81L "lot," the danger that the public might be misled into believing the plan showed only buildable lots is dissipated. The Bloom opinion suggests that such noncompliance could be shown by depicting the inadequate frontage on the plan or by an endorsement that the subject lot could not be used for building, but preferably by both methods. Were an 81P endorsement to be granted . . . on the plan as submitted, the public would have no way of ascertaining the basis of the decision from the recorded plan and could be misled as to the adequacy of frontage on a public way. On remand, Perry may amend the plan of lot 750 to show the boundaries and dimensions of the tract from which it is to be severed, and the board need not grant an 81P endorsement unless he does so. If appropriate, assuming the requirements for an 81P endorsement are otherwise met, the board may require a further endorsement of noncompliance with the zoning code on the plan as a condition of approval.

Perimeter plans can be recorded pursuant to Chapter 41, Section 81X, MGL. Such plans, however, are not entitled to the three year zoning protection found in Chapter 40A, Section 6,

MGL. Chapter 41 is only concerned with the recordation of plans and what plans require Planning Board approval or endorsement. Chapter 41 does not deal with zoning protection.

If it were not for the fact that ANR plans are entitled to a zoning protection pursuant to the provisions of the Zoning Act, there probably would be little interest whether a perimeter plan should receive an ANR endorsement.

Horne and Twomey, support the position that as a matter of law, perimeter plans are not entitled to an ANR endorsement. Although Perry states the need to show a division of land in order to obtain an ANR endorsement, under the Bloom rationale, an arbitrary line could be drawn but not necessarily show two lots.

The Costello decision supports the position that as a matter of law, perimeter plans are entitled to an ANR endorsement. Bart J. Gordon, Esq., of Bulkley, Richardson and Gelinas, and Paul L. Feldman, Esq., of Davis, Malm and D'Agostine, noted land use attorneys, are of the opinion that a Planning Board has no choice and must endorse a perimeter plan. They wrote an article in response to a Land Use Manager which reviewed lower court decisions that had supported the position that perimeter plans were not entitled to an ANR endorsement. They submitted their article to the Executive Office of Communities and Development. Their analysis is important as it identifies arguments in support of ANR endorsement for perimeter plans. Mr. Gordon and Mr. Feldman note that perimeter plans are entitled to zoning protection, citing Cape Ann Development Corp., Wolk, and Sampson (where Planning Boards had endorsed or failed to seasonably act on perimeter plans). These cases, however, did not decide that perimeter plans must be endorsed by a Planning Board. The statute defines both "subdivisions" and non-subdivisions in terms of "the division of a tract of land into two or more lots". Thus, where a plan shows no division of land, an argument can be made that the plan neither constitutes a subdivision or non-subdivision under MGL, c.41, § 81L. Are perimeter plans entitled to an ANR endorsement? You be the judge.

Perimeter Plans Are Entitled to ANR Endorsement

By Bart J. Gordon and Paul L. Feldman

> In Land Use Manager, Vol. 7, Edition 4, May, 1990, on Perimeter Plans, Donald Schmidt suggests that a perimeter plan -- a plan showing the circumference of property and not dividing the property into two lots -- is not entitled to an endorsement under G.L. c. 41, § 81P. Mr. Schmidt relies on two Superior Court decisions that suggest that a planning board need not endorse a perimeter plan as "approval not required" ("ANR") under the Subdivision Control Law. The absence of such endorsement may be intended to deprive the plan of any zoning freeze protection under G.L. c. 40A, § 6, sixth paragraph. Planning boards who wish to prevent such freezes may rely on the Land Use Manager to justify refusal

to give an ANR endorsement. Such reliance, however, is misplaced and may result in significant litigation.

The sole inquiries for a Planning Board when reviewing a request to endorse an ANR plan is whether the plan shows a subdivision of land and whether vital access is assured. A perimeter plan does not show a subdivision of land. It is a plan of existing ownership, and no new boundaries are created. Nonetheless, despite questions raised by the Superior Court decisions, they are plans which the Planning Board must endorse under G.L c. 41, § 81P. The statute is clear:

> "Any person wishing to cause to be recorded a plan of land situated in a
> ... town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such ... town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words 'Approval under the subdivision control law not required' or words of similar impact with the appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision" (emphasis added).

The language of the statute says that if the plan does not show a subdivision, a planning board must endorse it. The fact that a plan under G.L. c. 41, § 81X, could be recorded with a surveyor's certificate (of no new lines of division of existing ownership) does not provide a board with a basis for failure to endorse a perimeter plan. If the planning board fails to act on endorsing the plan, an applicant is entitled to a certificate from the town clerk and the failure to act has the effect of an endorsement.

There are several appellate decisions acknowledging planning board endorsement of perimeter plans and the effect of a failure to endorse. See Cape Ann Development Corp. v. Gloucester, 371 Mass. 19 (1976).

In December, 1972, Cape Ann submitted a "perimeter plan" of the locus to the Gloucester Planning Board, requesting that the plan be endorsed subdivision approval not required. See G.L. c. 41, § 81P. A city clerk's certificate concerning

the failure of the planning board to act seasonably, equivalent in effect to such an endorsement (G.L. c. 41, § 81P), was obtained and recorded with the 'perimeter plan' in the registry of deeds."

See Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976): "the planning board's endorsement under G.L. c. 41, § 81P, on his 'perimeter plan' ..." Sampson v. San Land Development Corp., 17 Mass. App. Ct. 977, 978 (1984): "On January 26, 1972, San-Land filed a perimeter plan with the planning board and obtained its stamp indicating that subdivision approval was not required. See G.L. c.41, § 81P." Each of these cases make clear that the zoning freeze protections of G.L. c. 40A, § 6, apply to perimeter plans. We have found no reported appellate case in which a planning board was upheld in refusing to endorse a perimeter plan, although the Malden Trust Company v. Twomey, Middlesex Sup. Ct. 6574 (Sept, 28, 1989), decision does reach this result.

Section 81P twice uses the word "shall" to describe the planning board's obligation to endorse a plan if it does not show a subdivision. "The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion." Johnson v. District Attorney for the Northern District, 342 Mass. 212, 215, (1961). The Superior Court cases turn the mandatory "shall" into a discretionary "need not."

To reach this result, a court must disregard the language of G.L. c. 41, § 81P, and existing appellate decisions construing it. The Superior Court decisions pointedly avoid the policy issue of whether perimeter plans should receive zoning freeze status. Indeed, despite language in Horne v. Board of Appeals of Chatham, Barnstable Sup. Ct. 46345 (Nov. 4, 1986), that the planning board "should not have endorsed" the perimeter plan, the Court held that the endorsement (even if erroneous) conferred a zoning freeze. A large body of law exists construing zoning freezes. See B.J. Gordon and R.C. Davis, Zoning Freezes, Chapter 7, Massachusetts Zoning Manual, (MCLE, 1989). While planning boards may be frustrated by a landowner's attempt to secure some protection from a rezoning which might have catastrophic economic impact, the Legislature in G.L. c. 40A, § 6, has struck a balance to afford landowners some protection against changes while a project is under development. One may disagree with the statute, but, until it is amended, it is the law.

There is an obligation on the part of Land Use Manager to point out both sides of disputed issues. As is indirectly suggested, by reference to the cases of Bloom v. Planning Board of Brookline, 346 Mass. 270 (1963), and Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. (1983), a landowner may avoid a planning board's refusal to endorse a perimeter plan by filing a plan with a division into

lots but adding a notation that the lots may not conform to the zoning by-laws or that one of the lots is not a buildable lot. The Bloom and Perry cases suggest that a freeze may be obtained by filing a perimeter plan with an arbitrary line of division, requiring an ANR endorsement. There is no policy reason to require such a tactic, particularly where the language of § 81P is unequivocal. Further, a planning board's failure to give an § 81P endorsement should - if the plan does not show a subdivision - lead to a clerk's certificate and the same result.

For these reasons, Land Use Manager and the Twomey case may be incorrect in suggesting that a perimeter plan is not entitled to ANR endorsement. The statutory language, appellate case precedent, and the policy underlying zoning freezes support a contrary interpretation. Until G.L. c. 41, § 81P, or c. 40A, § 6, sixth paragraph, are changed, our position is that a planning board has no choice regarding endorsement of perimeter plans. Under the statute, if no subdivision is shown, the board must provide the statutory endorsement. If it fails to act, the town clerk must so certify and the effect of endorsement is achieved.

PROCESS FOR APPROVING BUILDING LOTS LACKING ADEQUATE FRONTAGE

Frequently a landowner wishes to create a building lot which would not meet the minimum frontage requirement of the local zoning bylaw. As a Building Inspector, or member of a Planning Board or Zoning Board of Appeals, you have probably been asked by a local property owner what he or she must do to get approval for a building lot which does not meet the frontage requirement specified in the local zoning bylaw.

In Seguin v. Planning Board of Upton, 33 Mass. App. Ct. 374 (1992), the Massachusetts Appeals Court reviewed the process for approving building lots lacking the necessary frontage.

The Seguins wished to divide their property into two lots for single family use. One lot had the required frontage on a paved public way. The other lot had 98.44 feet of frontage on the same public way. The Seguins applied for and were granted a variance from the 100 foot frontage requirement of the Upton Zoning Bylaw. Upon obtaining the variance, the Seguins submitted a plan to the Planning Board seeking the Board's endorsement that approval under the Subdivision Control Law was not required. The Planning Board denied endorsement on the ground that one of the lots shown on the plan lacked the frontage required by the Upton Zoning Bylaw. Rather than resubmitting the plan as a subdivision plan for approval by the Planning Board pursuant to Section 81U of the Subdivision Control Law, the Seguins appealed the Planning Board's denial of the ANR endorsement.

Whether a plan requires approval or not rests with the definition of "subdivision" as found in MGL, Chapter 41, Section 81L. A "subdivision" is defined in Section 81L as the "division of a tract of land into two or more lots," but there is an exception to this definition. A division of land will not constitute a "subdivision" if, at the time it is made, every lot within the tract so divided has the required frontage on a certain type of way. MGL, Chapter 41, Section 81L states that a subdivision is:

> "the division of a tract of land into two or more lots...[except where] every lot within the tract so divided has frontage...of at least such distance as is then required by zoning...ordinance or by-law if any...and if no distance is so required, such frontage shall be of at least twenty feet."

The only pertinent zoning requirement for determining whether a plan depicts a subdivision is frontage. The Seguins argued that the words "frontage...of at least such distance as is then required by zoning...by-law" should be read as referring to the 98.44 foot frontage allowed by the Zoning Board's variance, with the result that each lot shown on the plan had the required frontage. In making their argument that their plan was entitled to an ANR endorsement, the Seguins relied on previous court cases which had held that the required frontage requirement of the Subdivision Control Law is met when a special permit is granted approving a reduction in lot frontage from what is normally required in the zoning district.

In Haynes v. Grasso, 353 Mass. 731 (1968), the court reviewed a zoning bylaw provision which had been adopted by the town of Needham. The bylaw empowered the Board of Appeals to grant special permits authorizing a reduction from the minimum lot area and frontage requirements of the bylaw. Before granting such special permits, the Board of Appeals had to make one of the following findings:

> a. Adjoining areas have been previously developed by the construction of buildings or structures on lots generally smaller than is prescribed by (the bylaw) and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as (required by the bylaw).
>
> b. Lots as large as (required by the bylaw) would not be readily saleable and could not be economically or advantageously used for building purposes because of the proximity of the land to through ways bearing heavy traffic, or to a railroad, or because of other physical conditions or characteristics affecting it but not affecting generally the zoning district.

The Board of Appeals granted a special permit which authorized the creation of two lots having less lot area and frontage than normally required by the zoning bylaw. On appeal, it was argued that the creation of the two lots was a matter within the jurisdiction of the Planning Board because the division of land creating lots lacking the necessary frontage was governed by the Subdivision Control Law. The court ruled that the Planning Board did not have jurisdiction as there was no subdivision of land requiring approval under the Subdivision Control Law. The court found that the requirement that each lot has frontage of at least such distance as required by the zoning bylaw was met by the granting of the special permit. The court further noted that this was not a variance from the zoning law but a special application of its terms.

The court reached the same conclusion in Adams v. Board of Appeals of Concord, 356 Mass. 709 (1970), where the Concord Zoning Bylaw authorized the Board of Appeals to approve garden apartment developments having less than the minimum frontage requirement of the bylaw. The court found that a lot, having less frontage than normally required by the zoning bylaw but which has been authorized by special permit, met the frontage requirement of the zoning bylaw and the Subdivision Control Law. Since the reduced frontage for the garden apartment plan had been approved by special permit, the Planning Board was authorized to endorse the plan approval not required.

The distinction in the Seguin case was that the Seguins received a variance to create a lot lacking the frontage normally required by the zoning bylaw. The court found that a plan showing a lot having less than the required frontage, even if the Zoning Board of Appeals had granted a frontage variance for the lot, was a subdivision plan which required approval under the Subdivision Control Law. In holding that the Seguins' plan was not entitled to an approval not required endorsement from the Planning Board, the court noted its previous decision in Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981). In that case, the court analyzed the authority of a Planning Board to waive strict compliance with the frontage requirement specified in the Subdivision Control Law.

Landowners, in Arrigo, wished to create a building lot which would not meet the minimum lot frontage requirement of the zoning bylaw. The minimum lot frontage requirement was 200 feet, and the minimum lot area requirement was 40,000 square feet. They petitioned the Zoning Board of Appeals for a variance and presented the Board with a plan showing two lots, one with 5.3 acres and 200 feet of frontage, and the other lot with 4.7 acres and 186.71 feet of frontage. The Board of Appeals granted a dimensional variance for the lot which had the deficient frontage. Upon obtaining the variance, the landowners applied to the Planning Board for approval of a plan showing the two lot subdivision.

The Planning Board waived the 200 foot frontage requirement for the substandard lot pursuant to the Subdivision Control Law and approved the two lot subdivision. MGL, Chapter 41, Section 81R, authorizes a Planning Board to waive the minimum frontage requirement of the Subdivision Control Law provided the Planning Board determines that such waiver is in the public interest and not inconsistent with the intent and purpose of the Subdivision Control Law.

As stated earlier, the minimum frontage requirement of the Subdivision Control Law is found in MGL, Chapter 41, Section 81L, which states that the lot frontage is the same as is specified in the local zoning bylaw, or 20 feet in those cases where the local zoning bylaw does not specify a minimum lot frontage.

In deciding the Arrigo case, the Massachusetts Appeals Court had the opportunity to comment on the fact that the Planning Board and the Zoning Board of Appeals are faced with different statutory responsibilities when considering the question of creating a building lot lacking

minimum lot frontage. Although MGL, Chapter 41, Section 81R gives the Planning Board the authority to waive the frontage requirement for the purposes of the Subdivision Control Law, the court stressed that the authority of the Planning Board to waive frontage requirements pursuant to 81R should not be construed as authorizing the Planning Board to grant zoning variances. The court noted that there is indeed a significance between the granting of a variance for the purposes of the Zoning Act and approval of a subdivision plan pursuant to the Subdivision Control Law. On this point, the court summarized the necessary approvals in order to create a building lot lacking minimum lot frontage.

> In short, then, persons in the position of the Mercers, seeking to make two building lots from a parcel lacking adequate frontage, are required to obtain two independent approvals: one from the planning board, which may in its discretion waive the frontage requirement under the criteria for waiver set out in G.L. c. 41, s. 81R, and one from the board of appeals, which may vary the frontage requirement only under the highly restrictive criteria of G.L. c. 40A, s. 10. The approvals serve different purposes, one to give marketability to the lots through recordation, the other to enable the lots to be built upon. The action of neither board should, in our view, bind the other, particularly as their actions are based on different statutory criteria.

Absent a zoning bylaw provision authorizing a reduction in lot frontage by way of the special permit process, an owner of land wishing to create a building lot which will have less than the required lot frontage needs to obtain approval from both the Zoning Board of Appeals and the Planning Board. A zoning variance from the Zoning Board of Appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. It is also necessary that the lot owner obtain a frontage waiver from the Planning Board for the purposes of the Subdivision Control Law.

In the Arrigo case, the landowners had submitted a subdivision plan to the Planning Board. The court noted that without obtaining the frontage waiver the plan was not entitled to approval as a matter of law because, although it may have complied with the Planning Board's rules and regulations, it did not comply with the frontage requirements of the Subdivision Control Law. After the Arrigo decision, it was debatable as to the process a landowner had to follow in obtaining a frontage waiver from the Planning Board. Rather than submitting a subdivision plan, another view was that a landowner could submit a plan seeking an approval not required endorsement from the Planning Board and at the same time petition the Board for a frontage waiver pursuant to 81R. If the Planning Board granted the frontage waiver and noted such waiver on the plan, then the Board could endorse the plan approval not required.

The Seguin case leaves no doubt as to the process that must be followed when a landowner seeks a frontage waiver from the Planning Board. If a lot shown on a plan lacks the frontage required by the zoning bylaw, then the plan shows a subdivision and must be reviewed under the approval procedure specified in Section 81U of the Subdivision Control Law. The Planning Board must hold a public hearing before determining whether a frontage waiver is in the public interest and not inconsistent with the Subdivision Control Law. A notation that a frontage waiver has been granted by the Planning Board should either be shown on the plan or on a separate instrument attached to the plan with reference to such instrument shown on the plan. It is unclear whether a Planning Board must allow the Board of Health 45 days to comment on the plan when the only issue before the Planning Board is the frontage waiver. We would recommend that Planning Boards consider amending their rules and regulations providing for a shorter review period when a landowner is only seeking a frontage waiver from the Planning Board. A Planning Board may also want to specify a fee and any relevant information that should be submitted with the plan.

In determining whether to grant a frontage waiver, a Planning Board should consider if the frontage is too narrow to permit easy access or if the access from the frontage to the buildable portion of the lot is by a strip of land too narrow or winding to permit easy access. In the Seguin case, the court noted that the lot appeared to present no problem and indicated that the Planning Board would be acting unreasonably if the Seguins submitted a subdivision plan and the Board did not approve the plan.

If you have a question concerning the process for reviewing ANR plans, your answer will most likely be found in either Sections 81L, 81P, 81T or 81BB.

Section 81T provides that every person submitting an ANR plan to the Planning Board must give written notice to the municipal clerk by delivery or by registered mail that he has submitted the plan. This is an important requirement if the Planning Board fails to act in timely manner. In Korkuch v. Planning Board of Eastham, 26 Mass. App. Ct. 307, (1988), the court determined that a developer who submitted an ANR plan but did not give immediate or very prompt written notice of the submission of the plan to the municipal clerk was not entitled to a certificate from the municipal clerk certifying constructive approval of the plan when the Board failed to act on the plan in a timely manner.

If the Planning Board determines that a plan does not require approval under the Subdivision Control Law, it should immediately, without a public hearing, endorse the plan "approval under the Subdivision Control Law not required" or words of similar import. Once the Planning Board has endorsed a plan, it cannot change its mind and rescind the ANR endorsement. In Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973), the court found that the authority to modify, amend or rescind plans under Section 81W is not applicable to ANR plans.

If the Planning Board determines that the plan requires approval under the Subdivision Control Law, the Board must give written notice of its determination to the municipal clerk and the person submitting the plan within 21 days after the plan has been submitted to the Board.

If the Planning Board determines that approval under the Subdivision Control Law is required, the person submitting the ANR plan may appeal the Planning Board's determination pursuant to Section 81BB. If the Planning Board endorses the plan "approval not required", judicial review of the endorsement can be claimed pursuant to MGL, Chapter 249, Section 4 and the time period for claiming review is 60 days. See Stefanick v. Planning Board of Uxbridge, 39 Mass. App. Ct. 418 (1995).

Automatic approval of a properly submitted plan will occur if the Planning Board fails to act on the plan or fails to notify the municipal clerk or the person submitting the plan of its determination within 21 days after the plan has been submitted to the Board. If the plan becomes approved for failure to take timely action, the Planning Board must immediately endorse the plan.

If the Planning Board fails to make such endorsement, the municipal clerk shall issue a certificate of approval to the person who submitted the plan. The certificate should indicate that the approval of the plan under the Subdivision Control Law is not required since no notice of action was received from the Planning Board within the required time period.

ANR PROCESS

If you have a question concerning the process for reviewing ANR plans, your answer will most likely be found in either Sections 81L, 81P, 81T or 81BB.

The Subdivision Control Law does not specify the manner in which an application for endorsement of an ANR plan is to be submitted to the Planning Board. Section 81P states that a plan is submitted to the planning board in the manner prescribed in 81T. Section 81T does not specify procedures for the submission of a plan to the Planning Board but simply requires that notice of such submission be given to the Town Clerk. Section 81O specifies the process for submission of definitive plans which allows the submission of plans at a meeting of the Planning Board or by mailing such plans by registered mail to the Planning Board.

In Maini v. Whitney, 7 LCR 263 (1999) (Misc. Case No. 250542), Judge Green of the Land Court held that the Halifax Planning Board could require that all ANR plans be submitted at a meeting of the Planning Board. Pursuant to Section 81Q of the Subdivision Control Law, the Halifax Planning Board adopted a regulation requiring that ANR plans be submitted at a regular or special meeting of the Planning Board. Judge Green concluded that the Halifax regulation was not inconsistent with the Subdivision Control Law because the Subdivision Control Law does not clearly determine the date on which an ANR plan is considered submitted to the Planning Board.

Section 81T provides that every person submitting an ANR plan to the Planning Board must give written notice to the municipal clerk by delivery or by registered mail that he has submitted the plan. This is an important requirement if the Planning Board fails to act in timely manner. In Korkuch v. Planning Board of Eastham, 26 Mass. App. Ct. 307, (1988), the court determined that a developer who submitted an ANR plan but did not give immediate or very prompt written notice of the submission of the plan to the municipal clerk was not entitled to a certificate from the municipal clerk certifying constructive approval of the plan when the Board failed to act on the plan in a timely manner.

Section 81P specifies that if the Planning Board determines that a plan does not require approval under the Subdivision Control Law, "it shall *forthwith*, without a public hearing, endorse ... [the plan] 'approval under the Subdivision Control Law not required' or words of similar import... . Such endorsement *shall not be withheld* unless such plan shows a subdivision." In Bisson v. Planning Board of Dover, 43 Mass. App. Ct. 504 (1997), a landowner submitted a plan to the Planning Board which did not show a subdivision. The Planning Board deferred endorsing the plan until town meeting amended the zoning bylaw increasing the minimum lot frontage requirement. After town meeting vote, the Planning Board denied ANR endorsement because the plan did not meet the new frontage requirement.

The court determined that the term "forthwith" in Section 81P compels immediate action after a Planning Board determines that a plan does not show a subdivision and that the Planning Board did not have the authority to delay its determination when the plan clearly did not show a subdivision.

Once the Planning Board has endorsed a plan, it cannot change its mind and rescind the ANR endorsement. In Cassani v. Planning Board of Hull, 1 Mass. App. Ct. 451 (1973), the court found that the authority to modify, amend or rescind plans under Section 81W is not applicable to ANR plans.

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Automatic approval of a properly submitted plan will occur if the Planning Board fails to act on the plan or fails to notify the municipal clerk or the person submitting the plan of its determination within 21 days after the plan has been submitted to the Board. If the plan becomes approved for failure to take timely action, the Planning Board must immediately endorse the plan.

If the Planning Board fails to make such endorsement, the municipal clerk shall issue a certificate of approval to the person who submitted the plan. The certificate should indicate that the approval of the plan under the Subdivision Control Law is not required since no notice of action was received from the Planning Board within the required time period.

Goldman v. Planning Board of Burlington, 347 Mass. 320 (1964) (an anr endorsement of a plan which was given in error does not obligate a planning board to endorse a later plan showing the same lots and the same frontage).

Devine v. Town Clerk of Plymouth, 3 Mass. App. Ct. 700 (1975) (where clerk of the planning board, who clearly had authority to accept anr plan for the board, for some unexplained reason, returned the anr plan to the petitioner which resulted in a constructive grant).

Lynch v. Planning Board of Groton, 4 Mass. App. Ct. 781 (1976) (planning board failure to act on an anr plan within 14 [now 21] days entitled petitioner to such endorsement and board's determination thereafter that the plan did require approval was without legal effect).

Landgraf v. Building Commissioner of Springfield, 4 Mass. App. Ct. 840 (1976) (lots shown on a definitive plan which had frontage on a public way were entitled to the zoning protection afforded subdivision plan lots).

Kelly v. Planning Board of Dennis, 6 Mass. App. Ct. 24 (1978) (where planning board failed to meet notice requirement of open meeting law when voting to deny anr plan).

J & R Investment, Inc. v. City Clerk of New Bedford, 28 Mass. App. Ct. 1 (1989) (mandamus is the appropriate remedy and owner's delay of 25 days between clerk's refusal to issue certificate endorsing owner's plan of land and owner's commencement of suit seeking mandamus relief was not unreasonable delay, and thus mandamus was available).

J. & R. Investment, Inc. v. City Clerk of New Bedford, 28 Mass. App. Ct. 1 (1989) (whether a board acted within the allowable time period will depend on whether reasonable persons examining the formal record could ascertain that a particular action was taken).